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Research Report

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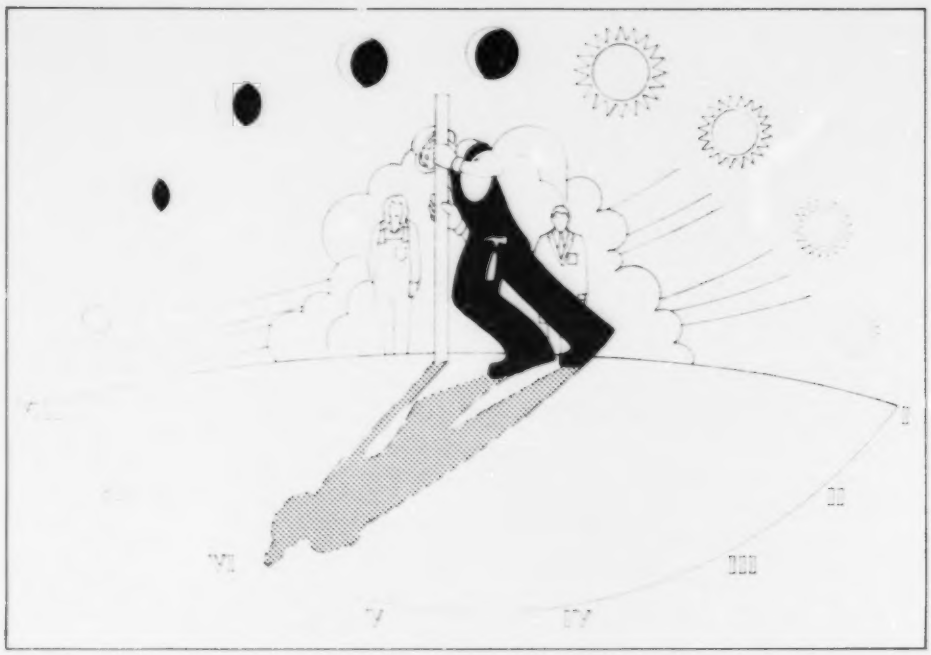

Current Administration of Legislated Standards on Hours of Work and Overtime

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CURRENT ADMINISTRATION OF LEGISLATED STANDARDS ON HOURS OF WORK IN ONTARIO

by

John Kinley*

(A Report Prepared for the Ontario Task Force on Hours of Work and Overtime)

* The views expressed in this report are those of the author and need not reflect the position of the Ontario Task Force on Hours of Work and Overtime.

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This background report was completed in August 1986 and is being published to coincide with the publication of the Phase II Report of the Ontario Task Force on Hours of Work and Overtime.

ABSTRACT: Current Administration of Legislated Standards on Hours of Work in Ontario

The paper outlines the current arrangements for administering Ontario's Employment Standards Act. It places special emphasis on those which control time worked. The description notes the legislative basis for the Employment Standards Branch of the Ministry of Labour and how the functions, authority structure and staffing and location of Branch offices derive from the law. Provision of information, audits of employer compliance with the standards and investigation of alleged violations of them are the principal components of the enforcement program. The day-to-day work associated with these three activities are the focus of the discussion of securing compliance with the standards, the major responsibility of the Branch. This work may extend beyond the authority of the staff and involve financial institutions, the courts and independent referees in the complaint settlement process. The place of each of these contributions to the administration of the Act is defined. Any one of these activities may occur in the enforcement of any standard but a major element of the administration of maximum hours is the authorization of work time in excess of the standard. Five different mechanisms for permitting flexibility in hours worked are discussed and the relative ease or difficulty of using them is a major element of the extended section of the paper entitled "Excess Hours". While the paper is descriptive it raises major questions about the design and effective administration of legislation directed at controlling hours worked.

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CURRENT ADMINISTRATION OF LEGISLATED STANDARDS ON HOURS OF WORK IN ONTARIO

The focus of this paper is on the means used to bring about employer and employee compliance with Ontario's standards governing working time. Most of the material presented deals with the administrative arrangements in place in 1986. Although some of the standards referred to have been in place for more than 40 years, their development is not traced in a systematic way. Earlier practices will be cited if they seem useful in explaining current ones.

Enforcement procedures are fairly similar for the various standards established by the Employment Standards Act. As a reflection of this, each member of the enforcement staff is likely to be engaged in carrying out an inspection pertaining to any one of the standards. This means that the practices described here are relevant not only to how maximum hours and vacations, public holidays, and overtime pay are administered, but to most of the enforcement work done by the Employment Standards Branch. There are, however, exceptions to these common arrangements and procedures. For example, authorization of working hours in excess of those set by the maximum hours standard is a specialized activity handled separately from the general enforcement program. In the material that follows, this notable exception will receive considerable attention.

Background information for this report was obtained from the relevant statutes and regulations, records, and statistics prepared by the Employment Standards Branch of the Ministry of Labour and from conversations with officers of that Branch. Specific references are not provided for this information, but the sources include recent Annual Reports of the Ministry of Labour and the 1985-86 Fiscal Year Report of the Employment Standards Branch.

The paper outlines the organization of the Employment Standards Branch, the enforcement process, and the arrangements for granting permits to exceed the maximum hours standard. Although the principal thrust of the discussion is descriptive, the paper presents some concerns about the legislation that are most clearly identified by observing administrative practices.

ADMINISTRATIVE ORGANIZATION

Section 41 of the Employment Standards Act makes the Minister of Labour responsible for its administration. The Minister is required to appoint a Director of Employment Standards to undertake the "general administration" of the legislation and the Director, in turn, may be assisted by Employment Standards Officers in numbers necessary to the effective enforcement of the Act. These legislative requirements are the authority for the Employment Standards Branch, the agency charged with the enforcement responsibility.

The staff of the Branch consists of the Director and Employment Standards officers plus support people who include secretarial, clerical, supervisory, policy development, legislation-interpretation, and information personnel. Currently the Branch has 177 complement positions, of which 92 are filled by officers directly engaged in audits of employer compliance and the investigation of claims alleging violation of the Act. Other staff members, notably regional and head office managers and supervisors, are also Employment Standards officers. Approximately one-third of the Branch workforce is based in regional offices located in Hamilton, Kitchener, London, Ottawa, and Sudbury, or in their subsidiary offices. The remaining two-thirds work in the headquarters or five regional offices located in the Toronto metropolitan area. The characteristics and geographical distribution of its employees are a reflection of the strong orientation of the Branch toward day-to-day administration of the Act. They also indicate that it has a capacity to deal with exceptional situations and to observe and evaluate the performance and coverage of its programs.

The arrangements for enforcing the standards extend beyond the Branch in several ways that are provided for in the Act. Ever since the Branch was empowered in 1969 to collect arrears of wages and financial penalties, a mechanism has been in place through which employers might appeal against assessments made. At first, referees were appointed by the Minister on a case-by-case basis and at least in some instances they were senior officers of the Branch. The 1974 Act provided for a panel of referees appointed by the Minister, from which the Director may call on individual members to conduct hearings or investigations. The two matters that are referred to a referee are orders of the Branch disputed by an employer, and questions about whether or not an employment practice found in industry subverts the purposes of the Act. On the former, the referee makes a final decision that becomes the position of the Branch; on the latter, the outcome of the referral is advice to the Director. Advantages of the arrangement are that it gives impartial review of problem situations by persons of recognized stature in employment relations while keeping the process rather simple and procedurally prompt. In addition, Section 11 of the Act requires employers "to make and keep" specified records that identify their employees and describe the conditions of their employment, such as wage rates and regular hours of work. These records are necessary for the fair application of the Act and make the employer an important supplier of information to the administrative process.

The Act identifies a number of ways in which the courts play a part in ensuring that employment standards are observed. Courts may uphold or deny a referee's decision, or the Branch may originate a prosecution of an alleged offence under the Act. More usually courts are involved in the administrative process when the Director files, with an appropriate court, for a certificate of an order to settle a claim. This gives the claim the status of one issued by the court itself (sections 54 and 59). Over the past five fiscal years the number of certificates issued has totalled 1,230 and ranged from a low of 169 in 1985-86 to 309 in 1982-83.

The organization for administering the Employment Standards Act began to take its present form in the early 1960s. Prior to that

time, the Industry and Labour Board had overseen compliance with the minimum wage, maximum hours, and vacation-with-pay standards.[1] The Board was assisted by an inspection staff that handled most of the Department's field work under the supervision of the Chief Factory Inspector.

A commitment was made in 1961 for the development of a group of inspectors specializing in labour standards to work under the direct supervision of the Board. This along with changes in the senior management of the Department signalled a new emphasis on the protection of workers who were not benefiting significantly from collective bargaining. Over the next few years, the levels and coverage of existing standards were up-dated, and in 1968 they, along with several new standards were placed in the Employment Standards Act, which became effective January 1, 1969. At the same time, the Industry and Labour Board was disbanded and full authority for administering all the standards was vested in the Director of a new Employment Standards Branch comprised mainly of the field and administrative staff developed during the preceding seven or eight years. Thus the major components of the employment standards administrative organization were in place when the new Employment Standards Branch was formed in 1969, although some refinements have been made since that time. Notable among these has been the formation of the standing panel of referees and some clarification of procedures.

SECURING COMPLIANCE

The work carried out by the Employment Standards Branch is intended to secure compliance with the standards defined in the Act. The principal components of this work are providing information, auditing employer observance of the standards and investigating and settling claims that arise from alleged violations. Work in each or all of these three areas may occur in connection with enforcement of any standard. Accordingly, they are the core elements of the enforcement program and account for most of the staff time involved. While the work activities are easily distinguished in this description, they

are closely integrated in the day-to-day activity of the Branch. This is best illustrated by how the audit and investigation functions are carried out.

Provision of Information

There is an ongoing requirement for information on rights and responsibilities under the Act and associated regulations. All Employment Standards officers and many other members of the Branch staff are engaged in supplying such information either as specialists in responding to inquiries or as part of conducting an assigned audit, investigation, or other activity. Perhaps the best available evidence of the need are data on the number of inquiries received. For fiscal year 1985-86 they were as follows:

Total enquiries.....	759,801
by telephone.....	726,636
by letter.....	3,955
by interview.....	29,210

The numbers were approximately the same for 1983-84 and have been well in excess of one-half million annually since the record was introduced in 1981.

The data on telephone inquiries are obtained from automatic counting devices on the telephones used by the information staff of the Branch and some others actively engaged in public contacts. The specialized staff is comprised of eight to ten full-time workers located in the main office in Toronto and one or two in each of the ten regions. A conservative estimate of the time devoted to the information service is twenty person years annually. Without question, a substantial number of the calls received are of limited significance; however, the information undoubtedly is an important factor in shaping employer and worker understanding of the standards. Neither the telephone nor the letter inquiries shown in the data listed immediately above include information relating to the resolution of claims that is, they refer to requests for information

about the meaning of and rights under the Act not the claim settlement process.

A breakdown of the inquiries by subject matter, source or other factor is not available, although the supervisor of the unit that provides information by telephone reports that questions relating to hours of work are not infrequent. This view is supported by a special count made for the five working days beginning August 5, 1986, which broke down as follows:

Issue	Number	%
Maximum hours.....	172	3.8
Public holidays with pay..	553	12.1
Vacation with pay.....	638	14.0
Overtime pay.....	191	4.2
All others.....	3,007	65.9
Total.....	4,561	100.0

The information service is not confined to responding to direct inquiries. In Fiscal Year 1984-85, the Branch distributed 20,000 copies of the Act as well as 150,000 copies of an explanatory pamphlet entitled Employment Standards. Seminars and public appearances by Branch staff are also a substantial information dissemination activity. In 1985-86 a total of 176 public appearances and employer education seminars occurred. These involved 4,900 participants, of which almost 2,000 were employers and supervisors and the remainder were employees, students, and the general public.

Although not an information service, the investigation and settlement of claims is a highly informative activity about many aspects of employment standards. Since roughly 18,000 claims are handled each year, there is an information fallout from the work to workers and employers. Many of these people are in positions from which they can influence future levels of observance of the Act.

Employer requests for assistance on how to achieve compliance with the maximum hours standard comprise an important dimension of the information activity. When the standard was introduced and for several years immediately thereafter, a high proportion of the employers appearing before the Industry and Labour Board made inquiries of this nature. The Board records show that it treated these situations as opportunities to advance employer understanding and compliance by working out case-by-case approaches to adjustment that were fair and not seriously disruptive. A somewhat similar situation has arisen since January 1986 in connection with the Minister of Labour expressing the view that excessive overtime is being worked in Ontario industry and that he would like to see this reduced as a means of generating more jobs. The Director has noted that the number of employers seeking assistance from the Branch on how to bring their own practices into line with the daily and weekly hours requirements of the Act has increased markedly. As well as involving the Branch in meaningful provision of information, the experience indicates the beneficial effect that timely political intervention can have on the administrative process.

Investigations of Complaints

The two formal procedures for enforcing the Employment Standards Act are the investigation of complaints and the conducting of routine audits or inspections, both by certified officers. The complaints procedure involves a sequence of events that begins with a worker, the worker's representative, or occasionally a competing employer lodging a complaint or claim about an alleged violation of a standard. The claim must be presented in writing, and it is given to a field officer to investigate and settle (see Appendix A).

The two principal approaches to investigation and settlement are by telephone or letter, and by a visit to the employer against whom the claim is laid in order to verify it by inspection of records and perhaps by securing information from interviews. Because of time constraints and costs, every effort is made to secure a settlement by telephone. Table 1 indicates that 58 per cent of the claims resolved

TABLE 1 - RESOLUTION OF COMPLAINTS UNDER ONTARIO'S EMPLOYMENT STANDARDS, 1985-86

Resolution	Number	%
Total Complaints	17,177	100.0
Resolved by phone or letter	9,992	58.2
Resolved by visit	7,179	41.8
Violations	12,413	72.3
Disallowed	4,764	27.7
Employee requested review (by 2nd officer)	145	3.0
Favour employee	90	62.1
Favour employer	55	37.9
Employer requested review (by referee)	283	2.3
Settled without hearing	45	15.9
Heard by referee	238	84.1
Rescinded	35	14.7
Amended	48	20.2
Sustained	155	65.1

Source: Information provided by the Ontario Ministry of Labour's Employment Standards Branch.

in 1985-86 were settled by telephone or letter. The remaining claims required visits to the employer's premises and inspection of employment and payroll records. These inspections are done not only to validate the claims but may involve a full audit of the employer's performance with respect to observance of the standards.

An important aspect of the investigation process is the authority of the Employment Standards officer to obtain the information necessary to reach a decision about the validity of claims. Section 45 of the Employment Standards Act gives the officer the right:

- to enter without warrant into premises other than dwellings, that are relevant to an investigation or audit;
- to require the production of records and documents relevant to the investigation or audit;
- to make copies of relevant records and documents and return the originals promptly to the person providing them; and
- to make inquiries of any person that may be relevant to the investigation or audit.

In addition to the above, the Act requires that officers be assisted and not be obstructed in the performance of their work. Despite these powers, it is not always easy to obtain the information needed to decide on a claim, and frequently it is necessary for the officer to have access to information other than that defined in section 11 of the Act.

After obtaining the relevant information, the officer determines the validity of the claim. As Table 1 indicates, during 1985-86 72 per cent of the claims processed were assessed as valid and the employer was deemed to be in violation of the Act.

If the claim is disallowed, this may involve obtaining employee recognition that it was not justified. An employee who is not satisfied with the officer's decision may request a review by another

officer, whose decision is final (Section 49). During 1985-86 there were 145 reviews less than one per cent of the 17,177 investigations completed. Out of 145 reviews completed during the year, the decision of the first investigation was confirmed in 90 cases and revised in 55 cases. The employee, of course, may refer the second officer's decision to a court if he is not satisfied with it.

When an officer determines a claim to be valid, it is normally necessary to obtain a financial settlement from the employer. Preferably this is accomplished during the investigation conversations and can result in the employer paying the wage arrears directly to the worker; the officer receiving the wages on behalf of the worker; or the officer issuing an order requiring payment of the wage arrears to the Director in trust.

Having paid an assessment approved under a claim, the employer may request a review of the order by an external referee who may affirm, amend, or rescind the decision of the Employment Standards officer. The referee is selected by the Director from the panel approved by the Minister. During fiscal year 1985-86, employers appealed 243 orders and 180 appeals were carried over from the preceding year. Of the 423 appeals in process during the year, 238 were completed by a referee's decision, 45 were settled without a hearing and decisions were pending on 140 cases when the year ended. Of the 238 cases settled by a referee, 155 (65 per cent) were sustained, 35 (15 per cent) were rescinded, and 48 (20 per cent) were amended. The referee's decision is the final one within the standards administration process on employer challenged claims. However, the employer may carry that decision to the courts for final settlement. It is highly improbable that an employee would wish to take court action on most referee decisions but the right to do so exists.

In the settlement of complaints where no financial consideration is involved, the officer's task is to persuade the employer to modify those practices that violate a standard. Because all complaints relating to maximum hours standards are of this type, it is of particular interest in this paper. A total of 94 hours-of-

work violations were reported in 1985-86. Officers of the Branch confirm that many of these claims are initiated by unions rather than individuals and few, if any, come from the ranks of unorganized workers. As well, a substantial number of the individual worker claims that do relate to the hours standard are concerned about the fair distribution of overtime hours, not with the fact that the standard is being exceeded.

In contrast with maximum hours, claims relating to the other work-time standards (vacations, public holidays, and overtime pay) are heavily money oriented and account for a major share of the total number of collections made by the Branch. For example, in each of the four most recent fiscal years these three standards accounted for more than half of the total number of collections made; by far the greatest number related to vacation pay, with 8,526 collections made in 1984-85. Vacation pay also consistently accounts for more dollars collected than any other standard, $2,838,850 in 1984-85 and $2,602,846 in 1985-86 (respectively 30.8 and 31.7 per cent of claim collections). Both the number of collections and dollar amounts cited derive from claims for vacation pay and from wage, termination and other collections on which 4 per cent vacation pay is added. Combined vacation, public holiday, and overtime pay collections accounted for 43.6 per cent of total collections in 1984-85 and for 46.6 per cent in 1985-86.

The relatively large number of vacation pay claims and collections made reflects an important characteristic of the employment standards program. Well in excess of 90 per cent of the claimants are former employees of the employers named in the claims filed. The collection service benefited workers to the extent of $8,219,000 in 1985-86, but the question remains open as to whether or not collecting money from past employers of claimants is a strong positive force on working conditions in the Province. This question, however, is more relevant to program design than to administration.

Audits

An audit is a review of an employer's records and practices for the purpose of determining whether or not the hours, wages, holidays and other employment arrangements are in compliance with the legislated standards and if the records themselves are satisfactory. Such a procedure may be undertaken as a routine inspection initiated by the Branch or in conjunction with the investigation of a claim. A full audit is not possible when investigations are handled by telephone, although some matters closely related to the subject of the claim may be explored even in a telephone investigation. Similarly, full audits may not result from every claim investigated by means of a field visit. If the employer is large and has an organized work force and a generally good compliance record, an audit is unlikely to result from a single claim. On the other hand, if the claim comes from an industry or type of employment in which infractions of the standards are common occurrences, a field investigation almost invariably involves an audit as well. Where there is doubt about the need for an audit, the decision is left to the discretion of the investigating officer. Thus, there are no firm statistics on the number of audits done in conjunction with the 7,178 field investigations carried out in 1985-86.

If in studying an employer's records the officer finds that the standards are being observed, no further action is required. On the other hand, if a violation is discovered, a claim is prepared and settlement procedures are followed as outlined under the discussion on investigations. In the 102 routine inspections conducted in 1985-86, 36 violations were found and 26 resulted in the collection of $98,666 for the benefit of 265 workers. Data are not available on the outcomes of the audits conducted in conjunction with claim investigations.

The statistics show that the number of Branch-initiated audits is relatively small compared with those triggered by the receipt and investigation of a claim. In fact, the figure is declining rapidly, as follows:

Fiscal Year	Routine Inspections	% Violations
1981-82	1,183	n.a.
1983-84	672	n.a.
1984-85	321	26.5
1985-86	102	35.3

The trend is of concern because it reveals that the compliance program of the Branch is being shaped by the claim-settlement activity. More specifically, there are categories of establishments, particularly in highly competitive service industries, in which claim-triggered audits are not likely to result in sufficient contact with the employers to ensure observance of the standards. The problem arises in part from a growth in the claims workload that out-stripped the growth of the Employment Standards officer staff. A recent major increase in that staff, however, may restore the situation to one in which the Branch management has more discretion in determining what work is done.

EXCESS HOURS

Despite the orientation of the information, investigation, and audit activities of the Employment Standards Branch, the primary focus in the administration of the 8-hour day and 48-hour week maximum is on permitting exceptions to it. That is, the legislation provides for the maximum hours standard to be relaxed when an urgent or reasonable need for longer hours arises. In some instances this relaxation is an easily attained right, and in others it is given at the discretion of the Director.

The Setting

The purpose of the excess hours arrangements is to permit flexibility at the same time maintaining control over hours worked. To a great extent the standard is patterned on the work-time requirements of the large part of industry where work is easily scheduled and has a clearly defined beginning and end each day. In these situations it

is appropriate for direct application. However, where the volume of work varies or naturally extends for periods either shorter or longer than 8-hours daily or 48-weekly, the standard can become a strait-jacket that impedes efficient operation of industry and perhaps ignores the preferences of workers. Permission to work excess hours is intended to accommodate the great variety of work-time requirements imposed by traditions, markets, technology, costs, preferences, and other factors — but at the same time protect worker health and safety and job opportunities.

Table 2 shows the prompt development of the excess-hour approval system after the Hours of Work and Vacations with Pay Act, 1944 came into effect. The high level of anxiety in industry and the government of the day over the practicality of a comprehensive maximum hours standard ensured that arrangements for granting overtime permits and other devices for relaxing the standard were put in place quickly. In doing this the government lived up to its promise to administer the standard with flexibility. The degree to which the doctrine of "flexible administration" has been pursued since its implementation raises a question as to whether the maximum hours requirement is in fact a standard like the others in the Employment Standards Act.

Table 2 also indicates how little change there has been in the permits and other approaches to relaxing the maximum hours since the devices designed in 1944 and 1945 were put in place. The administration of the permits has been based on substantially the same authority since that time, and as a consequence, precedents have a major influence on the decisions made. It may therefore, be useful to note some of the practices that gained acceptance between 1944 and 1950, when the maximum hours standard was going through its "running-in" period.

The Industry and Labour Board, the administrative agency for the Hours of Work and Vacations with Pay Act, clearly was alert to the government's concern that the new hours standard not be unduly disruptive and that it be applied in a flexible manner. At the same

TABLE 2 - AUTHORITY FOR WORKING HOURS IN EXCESS OF MAXIMUM UNDER HOURS OF WORK AND VACATIONS WITH PAY ACT AND EMPLOYMENT STANDARDS ACT, 1944-1986

Statute or Regulation	Excess Hours Authority
1944	
Hours of Work and Vacations with Pay Act, 1944	o *Authorized in case of an accident, urgent work required on plant or equipment or by force majeure.
	o Permitted, with administrator's approval, where employees and employer agree to alternate hours because maximum not "feasible" to apply.
Ont. Regulation 8/44	o 120 excess hours per year granted on written request by employer and number not reduced by emergency overtime.
	o *"Special Permit" where "nature of the work" or "perishable nature of the raw material being possessed" requires longer hours and administrator agrees.
	o *Employee may refuse to perform approved overtime work.
1945	
Ont. Regulation 92/45	o *"100 Hour Permit" introduced, making 100 overtime hours per employee per year and 12 hours per week for "non-productive" workers (watchmen, engineers, shippers, etc.) available on request. (120 hour permit withdrawn.)
1950	
Ont. Regulation 144/50	o *Excess hours approved under an Industrial Standards Act, schedule not considered a contravention of the standard.

Table 2 continued

Statute or Regulation	Excess Hours Authority
1964	
Hours of Work and Vacations, with Pay Amendment Act, 1964	o Six hours per week limit placed on excess hours worked by "young persons" (under 18 years of age.)
1968	
Employment Standards Act, 1969	o Authority for emergency overtime, "100 Hour Permit," "Special Permit," priority of Industrial Standards schedules, and worker's right to refuse (*above) incorporated into new Employment Standards Act.
	o Six-hour weekly limit on overtime for young persons (1964 above) restricted to females.
	o Employer and employee agreements to exceed standard prohibited.
1974	
Employment Standards Act, 1974	o Six-hour weekly overtime limit for young females removed (1968 above).
1986	
	o Excess hours authority as described in 1968 and 1974 above.

time, it is clear from the Board's minutes and other records that the workload arising from the new Act was very heavy. All of these factors almost certainly had an impact on the development of permit administration. Some of the approaches revealed by the records are:

- that heavy emphasis was placed on employers adapting regular or standard hours of 8 per day, and 48 per week or less and that they be treated leniently with respect to overtime while adjusting to this requirement;
- that excess hours be calculated on the basis of 48 in the week and that daily hours be permitted to vary so long as they did not total to more than the weekly maximum (Board Minutes, October 20, 1945);
- that, at least during periods of employer adjustment to the maximum hours requirement, the permitting authority be interpreted liberally by using such devices as: "continuing current practice until notified to do otherwise"; authorizing overtime "as required"; after-the-fact application of the 100 Hour Permit; exercising little or no control on the number of Special Permits issued to one employer; and granting Special Permits on condition that the employer take specific action to eliminate the problem (for example, initiate a training program);
- gradual development of industry permits; and
- exercising caution in allowing workdays longer than 10 hours.

Some of these practices live on in decisions made today about the application of the hours standard and others -- for example, industry permits -- are an integral part of the hours control system.

Table 2 shows that the approach to permitting hours in excess of the standard devised in the 1940s is still in use today despite a radically changed employment environment. Perhaps the most important aspect of this change is the relationship of the maximum hours standard to prevailing regular hours of work. In the mid-1940s, roughly 50 per cent of the workforce worked regular hours in excess of 48 per week, but now that maximum is well in excess of the most usual regular hours of 40 or less. With such a major change in

community practices, the system for permitting excess hours is serving different purposes than it did when put in place. Other dimensions of the change are in the areas of workforce flexibility and capital costs. The Employment Standards Branch is constantly faced with arguments that working a plant at capacity for a short time is not justification for the major capital outlays necessary to expand it efficiently or for meeting the hiring, training, and fringe benefit cost of increasing the workforce to operate during weekends or other limited periods. Combined with international competition for jobs, these factors render the existing arrangements for permitting excess hours exceedingly difficult to apply. Perhaps the difficulty arises from failure to recognize the changes noted above in the policy basis of the legislation.

The Mechanisms

At present, the Employment Standards Act and regulations provide covered employers and employees five major mechanisms for exceeding the maximum hours standard. They are the means of ensuring flexibility in the application of hours controls considered so necessary by the framers of the legislation and endorsed since in the policies and administrative practices used in the development and enforcement of it. Of the five means of providing excess hours, three (workdays longer than 8-hours, generally available permits, and special permits) have been in place, although in slightly different forms, since the original regulations made under the Hours of Work and Vacations with Pay Act were approved in July 1944. A fourth, industry permits, evolved as an administrative convenience during the first five years of the Act. The fifth, hours averaging, was introduced in the 1968 Employment Standards Act. Each of the five mechanisms involves permission to work outside the standard without granting a formal exemption.

Exceeding Daily Maximum:

The daily maximum of 8 hours has never been regarded as quite so firm a control as the 48-hour week. It was accepted from the outset that

workdays might exceed the maximum "where the employer has by custom or practice established a workweek of forty-eight hours or less" and where the work week has been reduced to 48 hours and the employer wishes to introduce a five-day week. These terms of the 1944 regulations have evolved into section 18 of the present Act, which permits days of up to 12 hours on condition that the weekly maximum is not exceeded and the approval of the Director of Employment Standards has been secured. The provision is used to respond to the recent interest in compressed work schedules in which longer periods of work are exchanged for longer periods of time off work. Authority to follow such schedules remains in force until it is revoked by the Director, and the schedules are not approved unless there is reliable evidence that the employees affected want the change. There has been no particular difficulty with the approval process, and the Director issued 232 permits under section 18 in 1985-86 and 151 in the preceding fiscal year.

100-Hour Permit:

The concept of this permit dates back to 1944, and its present format appeared in regulations made under the Hours of Work and Vacations with Pay Act in November 1945. The terms of the permit are established by subsection 20 (1) of the Employment Standards Act and are:

> 20 (1) The Director may issue a permit authorizing hours of work in excess of those prescribed by section 17 (8 and 48) or approved under section 18, but the excess hours of work shall not exceed,
>
> (a) in the case of an engineer, fireman, full-time maintenance man, receiver, shipper, delivery truck driver or his helper, watchman or other person who, in the opinion of the Director, is in a similar occupation, twelve hours in each week for each employee; and

(b) in the case of all other employees, 100 hours in each year for each employee.

The permit is issued in response to the written request of an employer and remains in effect on an annual self-renewing basis until it is revoked by the Director.

The fact that the application for a 100 Hour Permit does not have to specify why the excess hours are needed ensures its extensive use. Almost 36,000 have been issued since 1949, and 435 were granted during the 12-month period ending March 31, 1986. Although these numbers suggest that this easily obtained approval accounts for a high proportion of the hours worked in Ontario in excess of the standard, there is no means of knowing how many of the permitted hours are used. Nor is uncertainty over their use diminished by the impression that some employers hold the permit as a sort of insurance to be drawn on only in unexpected circumstances. Nevertheless, from the point of view of practical administration, an easily accessed buffer arrangement such as the 100 Hour Permit provides is seen as a necessary feature of a maximum hours standard. Experience in the Employment Standards Branch suggests that a fixed standard imposed without a zone of tolerance would simply lead to extensive noncompliance with the law.

Only one point of difficulty arises in administering this permit. The words "similar occupation" in paragraph 20 (1) (a) give little guidance to the Director in determining what workers other than those listed might work 12 excess hours per week. The practice is to be conservative in extending the list.

Special Permit:

Special Permits receive much more attention than either the 100 Hour or industry permits even though they authorize a smaller fraction of the excess hours. The Special Permit is provided for in subsection 20 (2) of the Employment Standards Act which reads:

(2) Where the Director is satisfied that the work or the perishable nature of the raw material being processed requires hours of work in excess of those permitted under subsection (1), he may issue a permit therefore.

It is a device for extending hours of work beyond those possible under the 100 Hour Permit. To ensure that it is used in this way, all Special Permits lapse on December 31 each year regardless of whether or not the hours authorized under them have been used. There is no restriction on the number that may be issued to one employer.

Relative to other means of exceeding the hours standard, issuing Special Permits is a closely controlled process. The application must clearly show the rationale for the additional overtime hours, the number of employees in each classification, and the number of excess hours available to each employee involved. When approved, the detail of a Special Permit might appear as follows:

Number of Workers	Category and Location	Excess Hours Authorized
	Moonbeam Plant	
3	Tool and Die Makers	100 hours
50	Assemblers	80 hours
10	Inspectors	80 hours
4	Electricians	100 hours

The Director and one senior Employment Standards officer investigate each application to ensure that the reasons given for the request are well founded, and that the requirements in terms of numbers of workers and numbers of hours are not exaggerated. It does not support the application to include such occupations as general labour or helper in the list for which the additional hours are needed because neither skill shortage nor length of training necessary can be used as an argument for not hiring additional workers in categories such as these. As a consequence of this caution, the approval process tends to become a negotiation that reduces the request to its most essential elements. Even then a

relatively short-term approval is granted on condition that the employer takes steps in terms of training, reorganization, or workforce expansion to reduce the need for excess hours. In addition, where there is some element of dissatisfaction on the part of either party to the process, the Director endeavours to keep in touch with the situation and to reconsider decisions as new and more precise information on the need can be brought to bear on the problem.

The preceding paragraphs describe the process involved in approving a Special Permit as it appears in 1986. Because of the present Minister's stand that excessive overtime is being worked and that it should be used to create new jobs, the process is considerably stricter than it has been for some years. Throughout the history of the maximum hours standard, there have been cycles of relative ease and stringency in approving Special Permits. For example, there is evidence that a period of unusual ease developed in the latter years of the decade of the 1950s, only to be reversed during the 1960s and to swing back to ease once more after the Employment Standards Act came into effect.

Table 3 shows the number of Special Permits issued in each fiscal year since 1971-72. An analysis done in the Employment Standards Branch reveals that when growth of the Gross Provincial Product accelerates there are marked increases in the numbers of Special Permits issued, and vice versa.[2] Also, fewer permits have been issued in the 1980s than in earlier years. The fiscal year total was only 161 in 1985-86, the lowest number in the period covered by Table 3. Further, the number of excess hours approved by Special Permit fell to 956,280 in 1985-86 from 1,205,545 in the preceding 12 months.

Although, unfortunately, the available data do not show the numbers of firms that use Special Permits, they do show that during the calendar year 1983 the 249 active permits were given to only 80 employers.[3] The establishments affected varied in size from under 100 workers (17.5 per cent) to over 1,500 workers (16.2 per cent) and 85 per cent of them were in manufacturing industries. The highest

proportions of establishments in all industries and industry groups reported as using Special Permits were food and beverage (21.3 per cent), transportation equipment (11.2 per cent), and electrical products (13.8 per cent), but 49.8 per cent of the permits were given to employers in the transportation equipment industry. In the 80 establishments receiving the permits, the additional overtime hours accounted for only 1.1 per cent of the total hours available in the establishments. The results of the analysis show that the Special Permit program is used by very few employers and generates a very small proportion of total hours worked in the establishments using it. The proportion becomes minuscule when calculated on the basis of total hours worked in the Province. In other words, Special Permits are a relatively insignificant source of overtime hours worked in Ontario but they may increase the hours of those subject to such permits very substantially.

Despite the insignificance of Special Permits as a source of overtime, they create administrative problems. They are highly visible and can be turned into sensitive political issues both within the plant and at the overall provincial level. In addition, there are no established criteria on which to base a decision for issuing or withholding such a permit. Yet this was not always the case. During the first few years after the maximum hours standard came into effect, almost the only grounds on which Special Permits were issued were ones of labour shortage. This was a common and fairly easily validated situation during and after World War II and, if proven, was certain to gain a favourable response to an application, but frequently with the condition that the employer provide training or extend a search for qualified workers. Gradually, other factors such as reorganization, plant conversion or renovation, and unforeseen levels of demand for a product gained recognition as reasons why special excess hours should be granted.

The analysis of 1983 permits[4] referred to above found that the 80 establishments gave no fewer than 340 reasons why they should have permission to extend their hours of work. More than a quarter of them reported high product demand and an apparent lack of capacity to expand the workforce as a reason for requiring overtime.

TABLE 3 - SPECIAL PERMITS ISSUED BY THE EMPLOYMENT STANDARDS BRANCH 1970-71 to 1985-86

Fiscal Year	Number of Permits
1970-71	446
1971-72	409
1972-73	1,138
1973-74	726
1974-75	646
1975-76	383
1976-77	407
1977-78	449
1978-79	408
1979-80	267
1980-81	263
1981-82	293
1982-83	163
1983-84	274
1984-85	309
1985-86	161

Source: Annual Reports, Ontario Ministry of Labour.

Reorganization, new products" was the second most frequently cited factor, mentioned by 11.8 per cent of the applicants. "Maintaining high production standards" and "specialized skills required" together accounted for 14 per cent of the reasons, given while shortage of skilled workers fell to only 2.3 per cent. The relatively heavy emphasis on maintenance of high quality is a particularly significant change from earlier years and reflects intensified competition from abroad and owner concern about entrusting expensive production equipment to inexperienced workers or those with little commitment to the enterprise. However, the clinching argument for a permit is that "if we don't get it we will move the production [the jobs] out of the country to maintain our competitive position." Thus the criteria on which the decision is based tend to return to the job creation objective of the maximum hours program. If more jobs result from withholding a permit, that is the preferred decision; but if jobs are retained or increased by granting one, then it is almost certain to be granted.

As mentioned earlier, the decision to grant a Special Permit is arrived at by negotiation. Facts, timing, attitudes, bluff, and other tactics play a part and each case has to be handled to some degree as the individual circumstances dictate. Firm criteria would distort the decision-making process but better information is likely to improve it, and to that end, the Branch has recently developed questionnaires to be completed by the applicant-employer and the union, if any, representing the workers affected by the application. That there sometimes is almost full agreement between the two responses is not surprising. Both want the overtime hours. To be fair, however, some union responses, among the few seen, are more concerned about increasing jobs than adding to the time worked by those who already have them. Direct involvement of unions in special permit applications has increased in recent months but unions have taken an interest in how Special Permits are administered for many years.

Given the complexity of the factors to be considered when granting or refusing a Special Permit, the resources in the Employment Standards Branch are simply insufficient to make a

thorough evaluation of a company position that a high demand for its products does not warrant plant expansion, or that hiring additional staff is not a practical alternative to its need for overtime because of the technical nature of the work to be done. To make such assessments across a range of firms in the chemical, steel, electrical products, automotive and other industries requires levels of expertise in each field that cannot be reached by two officers working part-time on such cases. The result is a sense in the Branch of being asked to do the impossible, and that to make the assessments required, fully and fairly, would involve such extensive intervention in industry decisions as to render the process unacceptable.

Industry Permit:

Currently, 26 Industry Permits are in place. They allow hours of work in excess of the maximum standard to all employers in a designated industry on terms defined in each of the permits. In all but one of them, the regular workday maximum is extended from 8 to 10 hours under section 18 of the Act. Hours in excess of 10 per day are defined on the authority of subsections 20 (1) and (2). In some instances these excess hours are as defined in the 100 Hour Permit, but in most there are combinations of arrangements with some categories of workers being singled out for "hours of work as required," "twelve hours per week" or "250 hours per year." Like the 100 Hour Permit, Industry Permits once issued remain in effect from year to year until revoked by the Director. The generous nature of the provisions raises questions about how well balanced the control measures are in terms of their impacts on different industries.

The authority for industry permits is not set out clearly in the legislation. However, their use was foreshadowed in the 1944 debate of the Hours of Work and Vacations with Pay Bill in the Legislature, and they developed as an administratively necessary extension of the established permit system. An extensive exploratory process occurred between 1944 and 1949 that led to acceptance of the Industry Permit approach. During that period in particular, employers and their associations from laundries, road building,

hotels and restaurants, lumber, fruit and vegetable processing and several other industries met repeatedly with the Industry and Labour Board to discuss the application of the maximum hours standard to their operations. In some instances, practices were left as they had been until appropriate controls could be devised or short term rulings were made. In many instances these efforts were revised as the employers and the Board (or later the Employment Standards Branch) recognized a need for change and could agree on what it should be, and so evolved into hours requirements applicable to all firms in the industry. In many instances these efforts were revised as the employers and the Board (or later the Employment Standards Branch) recognized a need for change and could agree on what it should be, and so evolved into hours requirements applicable to all firms in the industry. Of the 26 permits still current, only one has been developed since the Employment Standards Act became effective in 1969, which indicates that they are a stable feature of the administrative process.

Almost all Industry Permits establish substantially less favourable working conditions for employees than those promoted by the hours-of-work provisions of the Act. Also, they tend to remove the employers subject to them from close scrutiny by the Employment Standards Branch. Many of the industries covered are major employers of labour, and include, for example: interurban and municipal transport; hotels, motels, tourist resorts, restaurants, and taverns; fruit and vegetable processing; crushed stone, quarry, sand and gravel; baking; and logging and sawmills. A complete list of the Industry Permits appears in Appendix B. Insofar as could be determined, the reasons for granting industry permits originate in administrative convenience, the inconsistency of industry work-time practices with the maximum hours, standard and the insistence of industry organizations on securing special treatment.

Hours Averaging

Subsection 2 (2) of Regulation 285 under the, Employment Standards Act permits weekly hours to be averaged for purposes of determining

those to which overtime pay will apply. The average may cover a period of two or more workweeks, and where the practice is approved the maximum standard of 48 hours weekly does not apply. However, premium overtime pay is required for all averaged hours in excess of 44 weekly. While the arrangement is an exemption from section 17 of the Act, it applies to covered employment and is granted at the discretion of the Director.

In 1985-86 a total of 201 hours-averaging arrangements were granted in hospitals, service stations, hotels, and other employment situations where work stations have to be covered for periods that are not compatible with the 8-hour day and 48-hour week pattern. However, applications for adopting the practice must provide evidence of employee approval of it and the schedule of hours to be worked in the averaging period.

SUMMARY QUESTIONS

The information gathered and reported here raises a number of questions about the maximum hours standard, its administrative process, and the extent to which the pursuit of flexibility has rendered it meaningless. Most of these concerns have been suggested in the text. Some are put more explicitly here:

- The increasing nonwage costs of employing workers, the specialized production skills, and the mounting potential for inexperienced workers to damage or misapply expensive capital equipment have worked against the usefulness of the maximum hours standard as a job creation device. What action would assist evaluation of these impacts of these developments on administrative hours standards in the administrative process?
- To what extent is it practical for Ontario to use more rigid hours of work control in manufacturing, mining and other industries that compete abroad, than is practiced in competing jurisdictions?

- Reduced hours of work in the community, exemptions, and permits to exceed the hours standard have reduced its relevance to such an extent as to render it of no effect across much of Ontario industry. Might a guideline more relevant to existing conditions reinforced by a strong premium rate policy be a more effective approach to hours control?
- While the Employment Standards Branch information program is comprehensive and accessible, it is rather low-key. Would it be useful to attempt to generate more employer concern about achieving compliance with the standards by mounting a more public and high profile information program?
- How useful is a claim-directed program in promoting compliance with standards.[2] Would a monitoring/education approach be more effective?
- The design of the legislation seems to have failed almost completely in ensuring the continued employment of workers who complain about a violation of an employment standard. What legislative and administrative approaches might correct this major shortcoming?
- Is there an imbalance in the design of the complaint settlement system in that the employer has access to an impartial referee while the employee must be satisfied, short of going to the courts, with the decision of a second Employment Standards officer?
- The 100 Hour Permit sets up two categories of workers, one of which has an effective 50 hour week and the other a 60 hour week. Do grounds for this distinction still exist and what are employee attitudes to it?
- Ambivalence on the part of workers and sometimes their representatives on the matter of working overtime as opposed to increasing employment raises administrative difficulties. Would it help to document and give more publicity to worker positions on individual Special Permit applications?
- Administrators of the Act have a sense of inadequacy and being caught in the middle in the Special Permit

"negotiations". Since a more analytical approach to granting Special Permits would be costly and, probably, less satisfactory to the parties interested, should the present system be given more formal recognition?

- Is there an equity problem in granting liberal industry permits that entail almost no administration to some industries while others that also chafe under the standard are forced to go through the individual permit approval process?
- Would it be worthwhile to try to obtain precise statistics on the number and characteristics of the workers involved in the exemptions, permits, and approvals that diminish the effective coverage of the Act?[2]

NOTES

1. The Industry and Labour Board was established in 1937 as a part of the Department of Labour with responsibility for administrating minimum wage, apprenticeship, and Industrial Standards legislation. Originally it had five members, three of whom were public servants, one represented industry, and one represented labour. In 1938, the industry and labour representatives were removed and a Board of three civil servants continued until 1969. In 1944, administration of the new Hours of Work and Vacations with Pay Act was added to the Board's responsibilities. The Board reported to the Deputy Minister of Labour until 1963, when it became part of a newly established Labour Standards Branch and began to report to its Director. That Branch, including the Board, evolved into the present Employment Standards Branch formed in 1969.

2. Ontario, Ministry of Labour, Excess Hours "Special" Permits Issued for 1983 Under the Employment Standards Act (Toronto: Working Conditions and Analysis Group, Employment Standards Branch, November 1985).

3. Ibid.

4. Ibid.

Ontario Ministry of Labour / Ministère du Travail de l'Ontario

Claim Information
Renseignements à l'appui d'une réclamation

For office use only
Réserve au bureau
File # - Dossier N°

Name of Business/Company
Nom de l'entreprise

Telephone - Téléphone

Address of Business/Company
Adresse de l'entreprise

City / Town
Ville

Postal Code
Code postal

Kind of Business
Genre d'entreprise

Supervisor's Name - Nom du superviseur

Your Name - Votre nom
Mr / M ☐ Miss / Mlle ☐
Mrs / Mme ☐ Ms ☐

Res. Domicile
Bus. Bureau

Your Address - Votre adresse

Date of Birth (students only)
Date de naissance (étudiants seulement)

City/Town
Ville

Postal Code
Code postal

Soc. Ins. No
N° d'ass. soc.

Kind of work performed for this employer
Genre de travail accompli pour l'employeur

Name of person who hired you
Nom de la personne qui vous a embauché

Rate of pay - Salaire $
per hour / par heure ☐ per day / par jour ☐ per week / par semaine ☐

Pay Period
Période de paye

Daily / Une journée ☐ Weekly / Une semaine ☐ Bi-weekly / Deux semaines ☐ Semi-Monthly / Un demi mois ☐ Monthly / Un mois ☐

Hours worked
Nbre d'heures de travail
- per day / - par jour
- per week / - par semaine

Days worked per week
Nbre de jours de travail par semaine

Do you owe your employer any money?
Devez-vous de l'argent à votre employeur?
☐ No / Non ☐ Yes / Oui - Give Details / - Donnez des détails

Have you asked your employer to pay?
Avez-vous demandé à votre employeur de vous payer?
☐ No / Non ☐ Yes / Oui - why refusal? / - Pourquoi a-t-il refusé?

First day worked
Premier jour d'emploi
Day / Jour Month / Mois Year / An

Last day worked
Dernier jour d'emploi
Day / Jour Month / Mois Year / An

Was service continuous? / Le service était-il continu? Yes / Oui ☐ No / Non ☐

If no give details of broken service
S'il était intermittent donnez des explications

Town City Township where work performed
Ville canton où le travail était exécuté

☐ Layoff / Congédiement ☐ Terminated / Licencié ☐ Quit / Démission

Length of notice
Durée du préavis

Did you receive written notice? / Avez-vous reçu un préavis? Yes / Oui ☐ No / Non ☐

Is there a Collective Agreement? / Existe-t-il une convention collective? Yes / Oui ☐ No / Non ☐

Union Name
Nom du syndicat

Local
Section

Claim Details – Use other side if required
Détails sur la réclamation — Utilisez le verso au besoin

Note: The Employment Standards Act limits the collection of unpaid wages to the two-year period immediately prior to the date of the filing of your claim and up to a maximum of $4,000.00.

Remarque: La loi sur les normes d'emploi limite le recouvrement des rémunérations dues à la période de deux ans précédant immédiatement la date de dépôt de la réclamation, jusqu'à concurrence de 4 000 $.

Amount claimed / Montant réclamé $

[redacted] Yes / Oui ☐ No / Non ☐

The above information is true to the best of my knowledge
Autant que je sache, les renseignements qui précèdent sont véridiques.

Date Signature

For Office Use Only - Réservé au bureau

Employer contacted No ☐ Yes ☐ Phone ☐ Letter ☐

TYPE	H.W	O.T.	V.P.	Ben.	Term.	W.S.	Other
	M.W.	P.H.	E.P.	Preg.	U.W.	Ded.	

Interviewer

Authorized for investigation

Appendix B

Industry Permits

Ambulance Services
Asphalt Paving and Miscellaneous Plant
Automatic Car Wash
Automotive Repair and Gasoline Service Stations

Baking
Camps for Children
Carbonated Beverages
Concrete Block Manufacturing

Contract Catering
Crushed Stone, Quarry and Sand and Gravel
Fruit and Vegetable Canning
Heating

Highway Transport
Hotel, Motel, Tourist Resort, Restaurant and Tavern
Interurban and Municipal Transportation
Laundry and Dry Cleaning

Local Cartage
Logging and Sawmill
Lumber and Building Supplies
Marinas

Milk Products - Fluid or Manufactured
Mining
Ready-Mix Concrete Plant
Retail Stores

Surface and Contract Diamond Drilling
Taxi